IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 2890 OF 2002

IN

SUIT NO. 60 OF 2002

IN

PETITION NO. 438 OF 2002

Mr. Bipin Bhogilal Shah .. Plaintiff.

vs.

Mrs. Lalita Bhogilal Shah

& Anr. .. Defendants.

And

M/s. Manesh Power Equipment

& Anr. .. Respondents.

Mr. R. Jain with G. Mehta for plaintiff.

Mr. Virag V. Tulzapurkar with Nagarsheth i/by Jhangiani, Narula & Associates for Defendant no.1.

Ms. A. Ghone i/by Kanga & Co. for respondent no. 2.

Ms. K. C. Nichani i/by A. Seth for respondent no.1.

CORAM : S.U. KAMDAR, J.

DATE : 15TH JULY, 2005.

P.C.

. The present notice of motion has been taken out by the petitioner who is claiming to be an executor of the last Will and testament of the deceased Mr. Bhogilal Prabhudas Shah dated 10.11.2000. The petition is filed for probate of the said will and the widow and another son, namely, Niranjan Bhogilal Shah have filed caveat contesting the said will.

2. It is not in dispute that Bhogilal was original purchaser of the flat bearing No. 14, on 3rd floor, Devi Meera Co-operative Housing Society Ltd., 18, L.D. Ruparel Marg, Nepeansea Road, Malabar Hill, Mumbai - 400 006. There is a share certificate which has been issued in his favour dated 30.6.1964. In respect of the said flat the deceased has in his will made certain disposition by sale of the said flat and distribution of the sale proceeds in the manner stipulated under the said will.

3. It is the case of the defendant no. 1 that the defendant no. 1 was joined in the said flat as a co-owner on 9.3.1990 during the life time of the said deceased and subsequently the defendant no. 1 has as a co-owner of the said flat has entered into a tenancy agreement dated 1.10.1994 in favour of a

company known as M/s. Manesh Power Equipment Pvt. Ltd., The defendant no. 1 and the defendant no. 2 being the directors of the said company and are in occupation and possession of the said flat. They are claiming to be so in possession as the directors of the said company. The defendant no. 1 have relied upon certain rent receipts which are admittedly signed and executed by the defendant no. 1 alone as co-owner of the said flat. There is a deed of transfer dated 14.12.2001 under which the said flat is purported to have been sold by the defendant no. 1 alone after the death of the original owner being the father of the petitioner herein in favour of one M/s. Surya Mahal Properties Pvt. Ltd., for a total sum of Rs. 5 lacs. The area of the flat is around 1055 sq. ft. and is situated at Nepeansea Road which is supposed to have been sold under the aforesaid transfer deed dated 14.12.2001 for a total consideration of Rs. 5 lacs. The defendant no. 1 and 2 are still in possession of the said property purportedly as tenants through the said company M/s. Manesh Power Equipment Pvt. Ltd., though the said flat is sold in favour of the aforesaid company M/s. Surya Mahal Properties Pvt. Ltd.

4. The plaintiffs have taken out the present notice of motion for the appointment of the Receiver, High Court Bombay and/or for appointment

of Commissioner for taking inventory of the articles lying therein and for an injunction from parting with possession of and/or handing over and/or creating any third party rights of whatsoever nature and/or dealing with, disposing off and/or alienating and/or encumbering any part or portion of the said flat.

5. The learned counsel appearing for the plaintiffs submits that till the issues are adjudicated between the parties it is necessary that the property must be protected and ultimately if the will is probated then the said property must be available for the purpose of disbursement in accordance with wish of the testator in his last will and testament dated 10.11.2000. On the other hand, the learned counsel appearing for the 1st defendant has contended that no order should be passed in the present notice of motion because this Court cannot determine the question of title even at the final hearing of the testamentary petition nor this Court can determine the validity and/or otherwise of the tenancy in respect of the said premises namely, flat No. 14, on 3rd floor, Devi Meera Co-operative Housing Society Ltd.,, 18, L.D. Ruparel Marg, Nepeansea Road, Malbar Hill, Mumbai 400 006. The learned counsel has further submitted that in any event, the defendant no. 1 always had a power to create tenancy as a co-owner in respect of

the said property and such tenancy was created during the life time of the deceased. It has been further contended that both the deceased and the petitioner herein deemed to have been owner of the said flat. The learned counsel has further contended that the property should be protected by granting injunction order restraining the respondent from further transferring the property and there is no need to appoint a Court Receiver.

6. In my opinion, the circumstances as set out hereinabove, it is obvious that there is a serious disputed as to the creation of the tenancy and a serious attempt to take the said flat out of the estate of the deceased and consequently out of the purview of the will of the deceased. Prima facie I am of the opinion that the documents which are executed by the 1st defendant being the tenancy agreement and further particularly the so called sale deed on payment of a sum of Rs. 5 lacs in respect of the flat admeasuring about 1250 sq. ft. situated at Nepeansea Road for a total price of Rs. 5 lacs is bogus and obviously an attempt to defeat the Will and the desire of the testator as per his last Will dated 10.11.2000.

7. In the aforesaid circumstances, in my opinion, the ends of justice requires the following order:-

8. The Court Receiver, High Court, Bombay, is appointed Receiver in respect of flat No. 14, 3rd floor, Devi Meera Co-operative Housing Society Ltd., 18, L.D. Ruparel Marg, Nepeansea Road, Malbar Hill, Mumbai 400 006 with a direction that the Receiver shall not dispossess any person but shall appoint such person or persons in possession as an agent of the Court Receiver. The Court Receiver shall also grant agency without fixation of any security but on payment of royalty charges that may be fixed by him in accordance with law. The Court Receiver while taking possession shall also make inventory of the articles found in the said premises and keep the same in a sealed envelope and send copies thereof to the parties. The ad-interim injunction to continue till the Receiver takes possession.

9. Application for stay of this order is rejected.